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MEMORANDUM FOR: Craig O'Connor

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SUBJECT Legal Guidance on Determining Related Actions and Developing Reasonable Alternatives for Inclusion in a Single EIS

Introduction

Under the National Environmental Policy Act, 42 U.S.C. § 4321 (NEPA), Federal agencies are required to assess and document the environmental effects of a range of alternatives to any proposed major federal action. The primary vehicle for meeting the requirements of NEPA is the environmental impact statement (EIS). Specific guidance regarding the scope and content of the EIS is provided through the regulations developed by the Council for Environmental Quality (CEQ) and codified at 40 C.F.R. § 1500 *et seq*. The purpose of this memorandum is to provide legal guidance regarding (1) when related actions must be included in a single EIS, and (2) when an EIS includes related actions, how the alternatives should be developed.

Scope of the EA or EIS

The scoping process of NEPA is the first step in organizing the EIS. During scoping, the agency must determine the precise nature and extent of the proposed action in order to properly identify and develop an adequate range of reasonable alternatives to address the action. Adequately defining the proposed action includes the identification of pending, existing, or reasonably foreseeable actions that are connected, cumulative or similar. It also includes articulating the proposed action's full extent, including all components, segments, and future phases. These factors, taken together, will determine whether the agency must consider the environmental effects of these related actions in a single EIS.

Setting out the rule that an agency may not divide a proposed action into smaller segments to avoid presentation of its full environmental effects, CEQ regulations at 40 C.F.R. § 1502.4(a) state that:

> Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be *evaluated* in a single impact statement. [emphasis added].

In addition to the requirement that all elements of a single course of action must be included in the same EIS, § 1502.4(a) refers agencies to the criteria for scope found in § 1508.25 to determine which actions should be included for discussion in the same EIS. Section 1508.25 defines three types of related actions: "connected" actions, "cumulative" actions, and "similar" actions, and sets out guidance for determining whether to include such related actions in the same EIS. The purpose of identifying these other actions is to avoid improperly obscuring the effect of one action on other pending or proposed actions.

Pursuant to §1 508.25(a)(1), "connected actions" are those that:

> " . . .are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:
>
> (i) Automatically trigger other actions which may require environmental impact statements.
>
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
>
> (iii) Are interdependent parts of a larger action and depend on the larger action for their justification."

According to § 1508.25(a)(2), "cumulative actions" are those that:

> ". . . when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement."

"Similar actions" under § 1508.25(a)(3), are those that:

> ". . . when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement."

The criteria for inclusion of related actions in the same EA or EIS have been further defined in a number of court decisions. In Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985), the Court found that road construction (the proposed action of the challenged Environmental Assessment) and subsequent contemplated timber sales (not included in the Environmental Assessment) were "inextricably intertwined" and therefore "'connected actions' within the meaning of the CEQ regulations." Id. at 759. The Court based this conclusion on the fact that made this finding because the EA characterized the proposed road as a "logging road" and rejected the "no action" alternative because it would not provide access to timber. Id. at 758. According to the Court, "[i]t is clear that the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales." Id. The Court also found that the two actions were cumulative actions. "The record plainly establishes that the Forest Service, in accordance with good administrative practices, was planning contemporaneously the timber sales and the building of the road. Either without the other was impracticable." Id. at 761. Based on this analysis, the Court held that "the Forest Service was required to prepare and consider an environmental impact statement that analyzes the combined impacts of the road and the timber sales that the road is designed to facilitate." Id.

Other examples in which actions are related to each other closely enough to require evaluation in a single impact statement include where a second action is foreseeable as a future phase of a previous action (See Blue Ocean Preservation Society v. Watkins, 754 F.Supp. 1450 (D. Haw. 1991) where; subsequent phases of a geothermal power project were linked to the initial phase and should have been considered in the same EIS); and where it would be irrational or unwise to take one action without another action (See Save the Yaak Committee v. Block, 840 F.2d 714 (9th Cir. 1988) where the court held; it would be irrational and unwise to build a logging road without expecting to harvest timber and both activities must be evaluated in the same NEPA document).

However, in Save Barton Creek Association v. Federal Highway Administration, 950 F.2d 1129 (5th Cir. 1992), the Court found that the decision not to include multiple highway segments in a single prepare an EIS on two highway projects was proper because "none of the segments . . . are scheduled for simultaneous or continuous construction and no evidence [was provided] that any segment . . . is dependent on any other segment for its utility." Id. at 1141. The Court noted articulated that the "proper question is whether the Segment 3 project serves a significant purpose even if the other related projects, the other segments, are not built for a long time or perhaps not at all. Id. The Court found that the Segment 3 had "independent utility," after it reviewed of the facts that Segment 3 ". . . [would] increase the utility of the existing roadway network . . . serve local needs . . . [and] relieve traffic on arterial and city streets," Id. at 1142.

Similar to the "independent utility' test in Save Barton Creek, the 2nd Circuit in Hudson River Sloop Clearwater Inc. v Department of the Navy, 836 F.2d 760 (2d Cir. 1988) held that the U.S. Navy's decision to build a ship home port was independent of its their decision to develop

housing for a ship's crew. The Court compared their facts with those in Thomas and found that unlike the situation "where timber sales cannot proceed without the road and the road would not be built but for the contemplated timber sales . . . the district court [below] explicitly found that '[e]ven if the Navy is unable to provide any family housing . . . military necessity requires it to proceed with the project.'" Id. at 763. Therefore, the Court held that the building the housing and the building the port were not "connected" as contemplated under the provisions of § 1508.25(a)(1).

Even projects which may benefit from each other and which are triggered by interdependent parts of a larger action do not need to be evaluated in the same EIS where to do so would paralyze agency decision making by requiring the agency to address an issue from every angle at once. In Northwest Resource Information Center, Inc. v. National Marine Fisheries Service, 56 F.3d 1060 (9th Cir. 1995), the court reviewed whether two federal actions designed to preserve dwindling stocks of wild salmon in the Columbia River were connected actions requiring analysis in one EIS. The two actions being considered were river flow improvement and transportation of juvenile salmon. The Plaintiffs in Northwest argued, *inter alia,* that NMFS and the Army Corps of Engineers had violated NEPA by failing to address the transportation action in its analysis of the flow improvement program. The 9th Circuit court held that the two actions, while interdependent, were not "connected" actions under NEPA and that to the extent that they were interdependent, they each could exist without the other, "...although each would benefit from the other's presence." Of particular note, the court went on to say that:

> We cannot agree with [Plaintiff's] argument...that the transportation program and the flow improvement measures are so interdependent as parts of a larger action of improving the survival of salmon that they must be addressed in the same NEPA document. On this rationale, measures involving harvest limits, hatchery releases, and habitat maintenance are also interdependent as parts of a larger action taken to benefit salmon. While we cannot allow an agency to segregate its actions in order to support a contention of minimal environmental impact...we also cannot force an agency to aggregate diverse actions to the point where problems must be tackled from every angle at once. To do so risks further paralysis of agency decision making.

Northwest at 1069. The court decided this way despite the fact that the "flow improvement measures and the transportation program are interdependent to the extent that flow levels trigger the transportation program." Id. footnote at 1069.

Other examples in which actions were found are not to be related to each other closely enough to require evaluation in a single impact statement include where individual site activities that were part of a larger program were too speculative for current evaluation (See Northern Alaska Environmental Center v. Lujan, 961 F.2d 886 (9th Cir. 1992); where National Park Service programmatic document did not evaluate site-specific future mining applications that would be

evaluated in subsequent tiered documents); and where actions were considered not sufficiently connected because the objectives of each action stood alone and were not inextricably intertwined (See Natural Resources Defense Council v. United States Department of the Navy, Case No. CV-01-07781 CAS, (WD CA 2002) where~~;~~ individual sea tests organized by the Navy were not dependant on each other for success and occurred independently and without cumulative effect and therefore did not have to be assessed in a comprehensive or programmatic EIS).

Thus the decision whether to include related actions in a single impact statement is a case-by-case determination that must consider the factors contained in the regulations, as further elucidated in the decisions cited above

Designing Alternatives

Once the agency determines what actions need to be in the EIS, the second step in ensuring that agencies meet the requirements of NEPA is providing an adequate range of reasonable alternatives that address the purpose and need of the proposed action. Specifically, 40 C.F.R. § 1502.13 requires that the EIS "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." To be found reasonable, the alternatives developed must each achieve the proposed action's objectives as stated in the statement of purpose and need. Citizen's Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991); Alaska Wilderness Recreation v. Morrison, 67 F.3d 723 (9th Cir. 1995). The statement of purpose and need is important because it explains why the Federal agency is taking action and what objectives are to be achieved. If the purpose and need for the proposed action are rigorously defined, the ~~number of~~ alternatives that will satisfy the need can more readily and aptly be identified and narrowly limited. The careful articulation of the statement of purpose and need is therefore crucial to the development of an adequate range of reasonable alternatives to the proposed action

NEPA was designed to apply broadly to all major Federal actions significantly affecting the human environment. Due to the wide array of Federal decisions covered, there are no rigid parameters governing the development of the proposed action or the range of alternatives to be evaluated. Instead, agencies are afforded a great deal of flexibility and discretion in delineating the proposed action and the appropriate range of alternatives. Lee v. Resor, 348 F.Supp. 389 (M.D. Fla. 1972). Courts typically apply the "rule of reason" to the development of the EIS and "as long as the [agency's] decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." Natural Resources Defense Council, Inc. v. Hodel, 865 F.2d 288, 294 (D.C. Cir. 1988) (quoting North Slope Borough v. Andrus, 642 F.2d 589, 599 (D.C. Cir. 1980)). NEPA's alternatives requirement is also subject to this "rule of reason" and according to the courts " . . . that rule of reason necessarily governs both which alternatives the agency must discuss, and the extent to

which it must discuss them." Alaska v. Andrus, 580 F.2d 465 (D.C. Cir. 1978). Finally, ". . . [a]n agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives," Seattle Audubon Society v. Moseley, 80 F.3d 1401, 1404 (9th Cir. 1996). What is important is that the agency adequately describe in the EIS its decision-making process with respect to the definition of the proposed action, the development of the purpose and need for the proposed action, the inclusion or exclusion of various related actions in the same document, and the selection of alternatives that meet the purpose and need.

If multiple actions are being evaluated together in a single EIS, and if the environmental effects of the alternatives for one action will be different depending on which of the alternatives is chosen for another action and neither action is independently justified, then the agency must fully analyze the environmental consequences of all relevant combinations of actions in order to fully comply with 40 C.F.R. § 1502.16.[1] Accordingly, the agency should carefully articulate each specific action and its relationship to the other actions and the stated purpose and need in the scoping section of the EIS to determine whether those relationships in fact require evaluation in a single EIS. If so, then relevant combinations, i.e., those resulting in different environmental consequences, must be fully analyzed. If not, then the agency may want to not include multiple actions in a single EIS to avoid " . . . [aggregating] diverse actions to the point where problems must be tackled from every angle at once," Northwest at 1069.

[1] The range of alternatives developed should consider only alternatives that are feasible (Sierra Club v. Froehlke, 534 F.2d 1289 (8th Cir. 1976)) and need not include alternatives that are remote and speculative (Natural Resources Defense Council v. Callaway, 524 F.2d 79 (2d Cir. 1975)). Additionally, the range of alternatives need not be exhaustive and the agency can exclude otherwise reasonable alternatives provided sufficient justification is provided to support that decision (Natural Resources defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972).